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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

-against-

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants,

-against-

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

APPELLEES' MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The appellees in the above captioned action ask leave to file their Motion to Affirm the Judgment and Order of the three-judge district court and to proceed on appeal in forma pauperis pursuant to Supreme Court Rule 53 and 28 U.S.C. §1915.

The appellees' affidavits in support of this motion are annexed hereto.

Dated: November 6,1974

Martin A. Schwartz

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel
56 Grand Street
White Plains, New York 10601
Tel. (914) 761-9200

NASSAU COUNTY LAW SERVICES
COMMITTEE, INC.
By: Leonard S. Clark, Esq.
285 Fulton Avenue
Hempstead, New York 11550
Tel. (516) 292-8100

Counsel for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-453

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-against-

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Appellants,

-against-

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

AFFIDAVIT

I, MARTIN A. SCHWARTZ, being first duly sworn according to law, depose and say in support of appellees' motion for leave to proceed in forma pauperis:

1. I am of counsel to The Legal Aid Society of Westchester County, attorney for appellees in the above entitled appeal. I am also counsel for petitioners in the related matter, Taylor, et al. v. Lavine, et al., Docket No. 74-5054, Petition for Writ of Certiorari filed in this Court on or about August 2, 1974. I am fully familiar with all of the proceedings herein and have personal knowledge of all of the facts set forth in this affidavit. I make this affidavit in support of appellees' motion to proceed in forma pauperis.

2. The named appellees herein and the class of persons they represent are all recipients of public assistance. They are represented by The Legal Aid Society of Westchester County and Nassau County Law Services, Inc., both of which are funded by the Office of Economic Opportunity to provide legal services to low income persons.

3. On or about August 2, 1974, appellees herein filed a Petition for a Writ of Certiorari sub nom. Taylor, et al. v. Lavine, et al., Docket No. 74-5054. Appellees herein, who are also the petitioners in Taylor, filed with their Petition for a Writ of Certiorari a Motion for Leave to Proceed In Forma Pauperis, supported by the affidavits of appellees Annie Taylor, Charlotte Otey and Rose Hurley. The originals of these affidavits are thus presently on file with this Court. A copy of these affidavits are annexed hereto in support of the instant motion to proceed in forma pauperis.

Appellees respectfully request that these affidavits of Annie Taylor, Charlotte Otey and Rose Hurley be considered in support of the instant motion of appellees to proceed in forma pauperis.

Martin A. Schwartz

Sworn to before me this
1st day of November, 1974

John T. Hand
Notary Public

JOHN T. HAND
Notary Public, State of New York
No. 60-6751100
Qualified in Westchester County
Term Expires March 30, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

-against-

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

AFFIDAVIT

I, ANNIE TAYLOR, being first duly sworn according to law depose and say, in support of my motion for leave to proceed in forma pauperis and without being required to prepay costs or fees:

1. I am one of the petitioners in the above entitled case.

2. I am represented in this proceeding by Nassau County Law Services Committee, Inc., an organization funded by the Office of Economic Opportunity to provide legal services to low income persons.

3. Because of my poverty, I am unable to pay the costs of said cause.

4. I am unable to give security for the same.

5. I believe that I am entitled to the redress I seek in said cause.

6. The nature of said cause is briefly stated as follows:

> The decision of the United States Court of Appeals for the Second Circuit, which upheld the validity of New York regulations which cause a pro-rata reduction of the shelter allowance of AFDC recipients because of the presence of a non-legally responsible person in the home, violates my rights guaranteed by the federal Social Security Act and implementing regulations of the United States Department of Health, Education and Welfare.

Annie Taylor
ANNIE TAYLOR

Duty witnessed and sworn to before me, a Notary Public, this 19th day of July, 1974.

Leonard S. Clark
Notary Public

LEONARD S. CLARK
Notary Public, State of New York
No. 30-0150000
Qualified in Nassau County
Commission Expires March 30, 19__

Notary Public, State of New York
No. 30-5150000
Qualified in Nassau County
Commission Expires March 30, 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

-against-

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART,. individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

AFFIDAVIT

I, CHARLOTTE OTEY, being first duly sworn according to law depose and say, in support of my motion for leave to proceed in forma pauperis and without being required to prepay costs or fees:

1. I am one of the petitioners in the above entitled case.

2. I am represented in this proceeding by Nassau County Law Services Committee, Inc., an organization funded by the Office of Economic Opportunity to provide legal services to low income persons.

3. Because of my poverty, I am unable to pay the costs of said cause.

4. I am unable to give security for the same.

5. I believe that I am entitled to the redress I seek in said cause.

6. The nature of said cause is briefly stated as follows:

> The decision of the United States Court of Appeals for the Second Circuit, which upheld the validity of New York regulations which cause a pro-rata reduction of the shelter allowance of AFDC recipients because of the presence of a non-legally responsible person in the home, violates my rights guaranteed by the federal Social Security Act and implementing regulations of the United States Department of Health, Education and Welfare.

Charlotte Otey
CHARLOTTE OTEY

Duty witnessed and sworn to before me, a Notary Public, this 19 day of July, 1974.

Notary Public — RICHARD S. CLAUK
Notary Public, State of New York
No. 30-0650900
Qualified in Nassau County
Commission Expires March 30, 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

-against-

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART,. individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

AFFIDAVIT

I, ROSE HURLEY, being first duly sworn according to law depose and say, in support of my motion for leave to proceed in forma pauperis and without being required to prepay costs or fees:

1. I am one of the petitioners in the above entitled case.

2. I am represented in this proceeding by The Legal Aid Society of Westchester County, an organization funded by the Office of Economic Opportunity to provide legal services to low income persons.

3. Because of my poverty, I am unable to pay the costs of said cause.

4. I am unable to give security for the same.

5. I believe that I am entitled to the redress I seek in said cause.

6. The nature of said cause is briefly stated as follows:

> The decision of the United States Court of Appeals for the Second Circuit, which upheld the validity of New York regulations which cause a pro-rata reduction of the shelter allowance of AFDC recipients because of the presence of a non-legally responsible person in the home, violates my rights guaranteed by the federal Social Security Act and implementing regulations of the United States Department of Health, Education and Welfare.

Rose Hurley

ROSE HURLEY

Duty witnessed and sworn to before me, a Notary Public, this 12th day of July, 1974.

Susan H. Bennett

Notary Public

[illegible]
Notary Public, State of New York
Sullivan County Clerk's # 1240
Commission Expires March 30, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

Octber Term, 1974

No. 74-453

BARRY VAN LARE, et al., Petitioners, -against- ABE LAVINE, et al., Respondents.	:	AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) SS:

Susan Loss, being duly sworn, deposes and says that:

I am over the age of 18 years and I am not a party to this action and I reside at 175 Columbus Avenue, White Plains, New York, and that on the 6th day of November, 1974, I served the annexed Motion for Leave to Proceed In Forma Pauperis on Honorable Louis J. Lefkowitz, attorney for Appellants at Two World Trade Center, New York, New York, the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Susan Loss
Susan Loss

Sworn to before me, this
/ day of November, 1974.

Martin A. Schwartz
Notary Public

[illegible]
Notary Public, State of New York
No. 03-[illegible]
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1975

Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-453

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Appellants,

-against-

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Appellees.

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Appellants,

-against-

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

MOTION TO AFFIRM

NASSAU COUNTY LAW SERVICES COMMITTEE, INC.
285 Fulton Avenue
Hempstead, New York 11550
Tel. (516) 292-8100

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel
56 Grand Street
White Plains, New York 10601
Tel. (914) 761-9200

Counsel for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-453

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ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the three-judge District Court be affirmed on the ground that the questions presented by appellants are so unsubstantial as not to require further argument.

Question Presented.

Do New York's public assistance regulations, which cause a pro-rata reduction in the shelter allowance of a family receiving Aid to Needy Families with Dependent Children assistance solely because of the presence of a non-legally responsible person in the home, constitute a conclusive presumption of decreased shelter need in violation of the Due Process Clause, and in violation of the Social Security Act and implementing regulations as construed by this Court's decisions in King v. Smith and Lewis v. Martin?

The Operation of the Challenged Regulations.

In New York, a public assistance family's rental allowance is computed as an item of need separate from the basic standard of need for the other necessities including food and clothing. N.Y. Social Services Law, §131-a. The rental allowances are provided pursuant to 18 N.Y.C.R.R. §352.3(a)(App. G, 93a-94a).* Pursuant to this provision, each local social services district in New York has established a schedule of maximum shelter allowances based on the number of persons in the household who are eligible for public assistance. The regulation provides that "such [maximum shelter] allowance schedule shall provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community." The rental allowance provided pursuant to section 352.3(a) thus reflects the shelter needs of the A.F.D.C. family.

The challenged regulations cause a pro-rata reduction from this shelter allowance solely because a family receiving Aid to Needy Families with Dependent Children assistance (A.F.D.C.)

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* The references are to the Appendix of Appellants' Jurisdictional Statement.

chooses to allow a person, who has no legal obligation to support the public assistance family, and who is not a recipient of public assistance, to reside with them. 18 N.Y.C.R.R. §§352.30(d); 352.31(a)(3)(IV). The regulations term this non-legally responsible person a "lodger." The facts reveal, however, that this so-called "lodger" may in fact be a disabled friend, an adult unemployed son, or an incapacitated sister. (App. A, 7a, App. B, 43a).

Under the challenged regulations, the A.F.D.C. family's shelter allowance is reduced without any determination by appellants as to whether the non-legally responsible person has made a financial contribution to the family's shelter expense, or is even able to make such a contribution, and even though the non-legally responsible person's presence in the home does not increase the rental expense to the public assistance family or to the state. In sum, the public assistance family's shelter allowance is reduced despite the fact that the public assistance family and its shelter needs remain unchanged in law and in fact.*

The reduction in the grant pursuant to the challenged regulations is substantial. In the case of the named appellees, the monthly grant was reduced by as much as $55. The single judge in the Hurley action found that "(t)his devastating reduction means in practice that rental payments must be met out of that portion of the welfare stipend alloted for food and clothing." (App. C, 64a).

That the regulations operate so as to presume that the "lodger" is paying a share of the rent is substantiated by the language of the regulations themselves: "When a female applicant or recipient is living with a man to whom she is

* See, Boucher v. Minter, 349 F.Supp. 1240, 1244 (D. Mass. 1972)(three-judge court).

not married... his available income and resources shall be applied in accordance with the following: ...." [18 N.Y.C.R.R. §352.31(a)(3)(emphasis added)] and "[in] the event [the non-legally responsible person] does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro-rata share of the regular shelter allowance." 18 N.Y.C.R.R. §352.30(d)(emphasis added).*

The Decision Below.

The majority decision of the three-judge court, in a full opinion, holds that New York's reduction in the A.F.D.C. family's shelter allowance solely because of the presence of a non-legally responsible person in the home, without determining whether the family's shelter needs in fact decreased, constitutes a conclusive presumption of rental contribution by the lodger and decreased shelter need in violation of the Due Process Clause. (App. A, 1a-20a).

In reaching this conclusion, the court below relied upon a consistent line of recent cases of this Court which hold that where important public benefits are at stake, the state may not conclusively presume relevant facts, but must determine the actual facts on a case by case basis. Board of Education v. La Fleur, 414 U.S. 632, 644 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971). The court below also held that "[t]his constitutionally required result is consistent with the statutory mandate of the federal A.F.D.C. program." [App. A, 17a and cases cited therein.]. Lewis v. Martin, 397 U.S. 552 (1970); King v. Smith, 392 U.S. 309 (1970). See also, Shea v. Vialpando, 94 S.Ct. 1746 (1974).

* As appellants state, the challenged regulations come into operation when the so-called lodger "has failed to pay his fractional share of the rent." (Jurisdictional Statement, p. 30).

The decision of the court below only requires appellants to make a case by case determination that the public assistance family's shelter needs in fact decreased prior to reducing the family's shelter allowance.* Appellants' interests are "protected... by... taking into account in determining whether a child is needy all actual and regular contributions to his support." King v. Smith, supra at 334.

I

THE DECISION BELOW IS CLEARLY CORRECT

Appellants claim that the reduction in the public assistance family's shelter allowance solely because of the "lodger's" presence in the home is justified by a change in the public assistance family's shelter needs.** (Jurisdictional Statement, pp. 9-10, 21, 31, 36-37.)

The presence of a non-legally responsible person in the home cannot itself decrease a public assistance family's shelter expense given the facts that the family's rental expense, available space and legal obligation to pay the rent are fixed. The presence of a non-legally responsible person in the home can only reduce the family's shelter needs and costs if this person pays a part of the rent, in which case the public assistance family's rental cost diminishes by the amount of the contribution.

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* This determination would be made at a state fair hearing pursuant to 18 N.Y.C.R.R. Part 358. These hearings are available in New York in compliance with this Court's decision in Goldberg v. Kelly, 397 U.S. 254 (1970).

** Appellants do not rely on the claim that the "lodger's" presence indicates that the public assistance family has excess space. This was the basis of the majority decision of the Circuit Court. (App. B, 37a). See discussion infra, at pp. 7-8.

Appellants reduce the public assistance family's shelter allowance without determining whether the non-legally responsible person has in fact made a financial contribution to the family or has paid part of the rent, or is even capable of making such a contribution or payment. By reducing the public assistance family's shelter allowance to reflect a supposed change in housing needs and costs, on the premise that the "lodger" could, should and would pay part of the rent, appellants are conclusively presuming that the lodger has the ability to make and has made such a payment, and that there has thus been a change in the public assistance family's shelter needs and costs.

As the court below held, this constitutes a conclusive presumption of decreased shelter needs and costs in violation of the Due Process Clause. This Court has consistently held that where important public benefits are at stake, the state may not conclusively presume facts but must provide the private party with a meaningful opportunity to show the actual facts. Board of Education v. La Fleur, supra; Vlandis v. Kline, supra; United States Department of Agriculture v. Murry, supra; Stanley v. Illinois, supra; Bell v. Burson, supra.*

Appellants claim that the presumption can be rebutted if the "lodger" applies for public assistance. (Jurisdictional Statement, pp. 30, 37). This does not afford public assistance families, the persons against whom the challenged regulations and conclusive presumption operate, an opportunity to rebut the presumption.** It is the party against whom the presumption operates, and who is faced with the deprivation of a "statutory

---

* The three-judge court found that "(i)n the circumstances of this case, the equal protection claim overlaps analytically with the due process claim." The court therefore found it "unnecessary to articulate a seperate equal protection gound of decision." (App. A, 19a).

** The public assistance family cannot, of course, compel the so-called "lodger" to apply for assistance.

entitlement" [Goldberg v. Kelly, 397 U.S. 254, 262 (1970)], who must be afforded the opportunity to rebut the presumption. Vlandis v. Kline, supra; United States Department of Agriculture v. Murry; supra; Stanley v. Illinois, supra.

In addition, the challenged regulations violate the federal Social Security Act and its implementing regulations as construed by this Court's decisions in King v. Smith, supra and Lewis v. Martin, supra. See also, Shea v. Vialpando, supra; 45 C.F.R. §233.90(a)(1973)(App. G, pp. 89a-90a). The essence of King and Lewis is that the Social Security Act requires the states, in evaluating a family's resources to determine the amount of benefits to which a family is entitled, to consider the family's actual resources on an individualized basis. The states may not terminate or reduce the public assistance grant solely because of the presence in the home of a non-legally responsible person.

King and Lewis are designed to protect the beneficiaries of the A.F.D.C. program, the needy and dependent children. These children are not protected when the state computes the public assistance grant on the basis of presumed rather than actual facts. The New York "lodger"is the pro tanto equivalent of the substitute "parent" in King v. Smith, 392 U.S. 309 (1970) and the "man assuming the role of spouse" in Lewis v. Martin, 397 U.S. 552 (1970). New York's reduction in the public assistance grant, solely because of the presence of a non-legally responsible person in the home, leaves the needy and dependent children unprotected in clear violation of this Court's decisions in King and Lewis.

The majority decision of the Court of Appeals upholding the challenged regulations is in clear conflict with King and Lewis. (See dissenting opinion of Circuit Judge Oakes, App. B, pp. 39a-52a.) The majority decision is based primarily on the view that the "lodger's" presence shows that the public

assistance family has excess space:

> "[I]t is clear that the New York regulations are based on the fair inference from the presence of the lodger in the household that the AFDC-recipient family actually needs less space that [sic] it is paying rent for." (Ex. B, 37a).

Even appellants do not rely upon this claim to support their position. (Jurisdictional Statement, p. 23 fn.). It was completely refuted by the evidence submitted before the three-judge court on remand from the Court of Appeals. (App. A, 12a-14a). Moreover, a conclusive presumption of excess space has exactly the same effect as the presumption of available income forbidden by King and Lewis. App. B, 45a; Owens v. Parham, 350 F.Supp. 598, 604 (N.D. Ga. 1972)(three-judge court).*

This Court has consistently found it unnecessary to grant plenary review of decisions invalidating state regulations that conclusively presume the availability of income to the A.F.D.C. family because of the presence of a non-legally responsible person in the home. Hausman v. Department of Institutions and Agencies, 64 N.J. 203, 314 A.2d 362 (1974), cert. denied, 94 S.Ct. 3083 (1974); Rodriguez v. Vowell, 472 F.2d 622 (5th Cir. 1972), cert. denied, 412 U.S. 944 (1973); Reyna v. Vowell, 470 F.2d 494 (5th Cir.), aff'd, 409 U.S. 809

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* The majority opinion of the Court of Appeals also states that the challenged regulations account "for the economies of scale that are realized when individuals live in groups; ...." (App. B, 37a.) However, there is no economy of scale when the total rental obligation is fixed and the lodger does not contribute to the family's rental expense. (App. B, 50a-51a.) The majority opinion of the Court of Appeals states that the challenged regulations prevent the allocation of public assistance to non-eligible persons. (App. B, 38a.) However, the lodger is only a beneficiary of the A.F.D.C. family's generosity from its own resources. Moreover, the public assistance grant is reduced despite the fact that the rental expense to the family and the state have not increased as a result of the "lodger's" presence. (App. B, 48a.) The fact that the non-legally responsible person receives those benefits and comforts that anyone who resides with another may receive was not an acceptable basis for terminating or reducing assistance in King and Lewis.

(1972); Gaither v. Sterrett, 346 F.Supp. 1095 (N.D. Ind.) (three-judge court), aff'd, 409 U.S. 1070 (1972); X. v. McCorkle, 333 F.Supp. 1109, 1118-1119 (D.N.J. 1970), aff'd per curiam sub nom. Engleman v. Amos, 404 U.S. 23 (1971); Gilliard v. Craig, 331 F.Supp. 587 (W.D.N.C. 1971), aff'd, 409 U.S. 807 (1972); Solman v. Shapiro, 300 F.Supp. 409 (D. Conn. 1969), aff'd, 396 U.S. 25 (1969).

The decision below clearly comports with the recent decisions of this Court invalidating conclusive presumptions. The decision below comports with this Court's decisions in King v. Smith, supra and Lewis v. Martin, supra. The challenged regulations have been marked "not approved" by the United States Department of Health, Education and Welfare. [See Appellees' Exhibit "A" annexed hereto.] There is no basis for plenary review in this Court and the judgment below should be affirmed.

II

THERE IS NO CONFLICT OF DECISION.

With the exception of the majority decision of the Court of Appeals in this case,* all of the state appellate courts and all of the federal courts that have ruled on the validity of provisions which are identical or similar to the challenged regulations have held that such provisions create a conclusive presumption of financial contribution or decreased housing need in violation of the Due Process Clause or the Social Security Act. Roselli v. Affleck, 373 F.Supp. 36, 46-47 (D.R.I. 1973); Mothers and Childrens Rights Organization v. Stanton, 371 F.Supp.298 (N.D. Ind. 1973); Owens v. Parham, 350 F.Supp. 598 (N.D. Ga. 1972)(three-judge court); Boucher v. Minter, 349 F.Supp.

* "The majority decision of the Court of Appeals "stands nakedly - and thankfully - alone...." (App. B, 39a.)

1240 (D. Mass. 1972)(three-judge court); Jenkins v. Georges, 312 F.Supp. 289 (W.D. Pa. 1969)(three-judge court); Hausman v. Department of Institutions and Agencies, 64 N.J. 203, 314 A.2d 362 (1974), cert. denied, 94 S.Ct. 3083 (1974); Waits v. Swoap, 115 Cal. Rptr. 21, 24-25, 524 P.2d 117, 120-121 (1974) (alternative holding); Cooper v. Swoap, 115 Cal.Rptr. 1, 9-11, 524 P.2d 97, 105-107 (1974)(alternative holding); Matter of Battle v. Lavine, 44 App.Div.2d 307, 354 N.Y.Supp.2d 680 (2d Dept. 1974). These decisions all comport with the rationale of the court below, i.e. (a) that the public assistance grant in general, and the rental allowance in particular, cannot be reduced solely because of the presence of a non-legally responsible person in the home, and (b) that the public assistance family's shelter allowance can be reduced only if its shelter needs have in fact decreased.

Appellants do not cite any contrary decisions. Their reliance upon Gilliard v. Craig, supra, Boucher v. Minter, supra and Dullea v. Ott, 316 F.Supp. 1273 (D. Mass. 1970) is misplaced. (Jurisdictional Statement, p. 32). The issue in this case was not before the court in Gilliard. Indeed, the only issue decided by the court in Gilliard was decided in favor of the recipient. In Boucher, the court held that the termination of the public assistance family's shelter allowance because of the presence of a stepfather in the home violates the Due Process Clause and the Social Security Act. This decision thus supports appellees' position herein. The court's reference to a reclassification into "Group II" is dicta and was conceded to be correct by plaintiff's counsel. Boucher v. Minter, supra at 1245 fn. 5. Moreover, "Group II" refers to a situation where the public assistance family "shares the cost of rent" with a non-recipient. Boucher v. Minter, supra at

1241-1242. The cost of rent can only be shared if the non-recipient pays part of the rental expense. See also, Id. at 1245 fn. 5.

The only claims presented in Dullea v. Ott, supra were the right to a hearing prior to a reduction of public assistance benefits and a pendent state law claim. Dullea v. Ott, supra at 1275. That part of the Dullea decision upholding the validity of the challenged regulation is clearly dicta, was "never specifically argued by the plaintiff" and, in any case, was based on principles of substantive due process. Id., at 1276-1277. It did not deal with the issues herein, i.e., the procedural due process and Social Security Act claims. As the court below concluded, "the rule against irrebuttable presumptions is an aspect of procedural, not substantive, due process." (App. A, 16a.). Vlandis v. Kline, 412 U.S. 441, 455 (1973)(Justice Marshall, concurring); Bell v. Burson, 402 U.S. 535 (1971).

In sum, there are no state appellate court or federal court decisions which conflict with the decision of the three-judge court below.

III

THE EVIDENTIARY AND PROCEDURAL QUESTIONS RAISED BY APPELLANTS DO NOT WARRANT PLENARY REVIEW.

A. The Admissibility of the Alleged Gifts Made to Appellee Hurley.

There are four bases to support the district court's refusal to admit evidence of alleged gifts made to appellee Hurley by the "lodger".

(1) The issue of alleged contribution by appellee Hurley's "lodger"had been finally resolved in prior proceedings between the parties. Appellant Van Lare, the Acting State Commissioner,

found after a state fair hearing that the "lodger" made "no contribution" toward the support of the Hurley family. (App. C, 63a-64a). In addition, in their statement pursuant to Rule 9-G of the Civil Rules for the Southern and Eastern Districts of New York, appellants admitted appellee Hurley's sworn statement that the lodger made no contribution to the Hurley family.

(2) The alleged gifts were allegedly made prior to the time that the lodger was residing with appellee Hurley. (Jurisdictional Statement, p. 40). A gift made prior to the time a "lodger" resides with the recipient family is irrelevant to a determination of the validity of a subsequent reduction in the shelter allowance while the lodger resides with the recipient family.

(3) Whether any person, including a "lodger", makes a gift of property to a recipient is an irrelevant issue under the challenged regulations. Moreover, the financial ability of the lodger to pay part of the rental expense is irrelevant under the challenged regulations. As the single judge in the Hurley action found:

> "[T]he regulations here under scrutiny are in one sense far cruder than were those at issue in Lewis v. Martin, supra. The California statutes at least took into account the income of the stepfather or MARS in computing the stipend payable to the family. The New York regulations reduce the rental stipend regardless of the lodger's income." (App. C, 65a)(emphasis in original).

In addition, there is no federal or state provision which prohibits a third person from making a gift to a recipient of public assistance.

(4) Disclosure of the recipient's case record without the authorization of a local (as opposed to a state) social services official would violate the recipient's right of confidentiality guaranteed by New York Social Services Law, §136(2).

The three-judge court had ample bases to reject appellants' offer of proof. This decision does not present an issue worthy of plenary review.

B. The Justiciability of Appellees Taylor and Otey's Claims.

The three-judge court found it unnecessary to decide whether the claims of appellees Taylor and Otey became moot because the non-legally responsible person in their homes had either moved out or had applied for and had been declared eligible to receive public assistance.

Under the circumstances of this case, it was not necessary for the court below to make this determination. The Taylor and Hurley actions had been consolidated before both the Court of Appeals and the three-judge court. (App. A, 3a). Since appellee Hurley's claim has at all times remained justiciable, and because appellees represent a class of some 10,000 recipients of public assistance [App. A, 2a], it was unnecessary to determine whether the claims of the other named parties, Taylor and Otey, remained justiciable. One named party with a justiciable claim is sufficient to represent a class of persons. 7 Wright and Miller, Federal Practice and Procedure, §1761, pp. 586-587 (1972).*

In addition, the very nature of the controversy is such that the situations of the parties are subject to constant change. Appellee Otey's son, for example, moved in and out of her apartment several times (App. B, 33a). The issue is of a recurring nature and to hold any named party's claim moot would render that claim "capable of repitition yet evading review." Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1910); Roe v. Wade, 410 U.S. 113, 125 (1973). In addition, because the challenged regulations work a reduction in the public assistance grant solely because the non-legally responsible person resides in

* Appellants did not contest the propriety of the class action before the three-judge court. (App. E, 81a).

the home, they have a continuing impact on the relationship between the public assistance family and the non-legally responsible person. See, Super Tire Engineering Co. v. McCorkle, 94 S.Ct. 1694, 1699 (1974).

C. The Scope of the Class.

The court below properly defined the scope of the class. The class consists of recipients of public assistance who receive a reduced grant of public assistance "solely because of the presence of a 'lodger' in the home pursuant to 18 N.Y.C.R.R. §§352.31(a)(3)(IV) and 352.30(d);" (App. E, 82a) (emphasis added). The use of the word "solely" in defining the scope of the class, and the decision below, make it clear that the judgment of the three-judge court does not prevent appellants from reducing the public assistance grant to the extent of actual contributions made by the non-legally responsible person. (App. A, 15a-16a). As the court below stated:

> "Before reducing the shelter allowance of a recipient family because the family houses a non-contributing lodger, the state must make an individualized determination of whether the presence of the lodger does in fact diminish the family's shelter needs." (App. A, 16a)(emphasis added).

CONCLUSION

Wherefore, appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and appellees respectfully move to affirm the judgment and decree of the three-judge District Court.

Dated: November 6, 1974
White Plains, New York

Respectfully submitted,

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel
56 Grand Street
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Tel. (914) 761-9200

NASSAU COUNTY LAW SERVICES
COMMITTEE, INC.
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Tel. (516) 292-8100

Counsel for Appellees

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

ASSISTANCE PAYMENTS
ADMINISTRATION

September 10, 1974

Mr. Marvin A. Schwartz
Legal Aid Society of Westchester County
56 Grand Street
White Plains, New York 10601

Dear Mr. Schwartz:

This letter confirms the information which we gave you by telephone on Friday, September 6, 1974. The call was in reply to your letter of August 20, in which you had asked for further information about New York Regulation 18 NYCRR § 352.30 (d).

The response to your first question is as follows: This section was on the page with other sections of the Regulations which were submitted to the Region II Office of the Social & Rehabilitation Service on September 1972 on Submittal No. 72-35. When the material was sent on to the central office to be filed as part of the State's approved plan for AFDC, this section 352.30 (d) was marked as not approved by the Regional Officer.

The response to the second question is that authority for approval of State Plan amendments has been delegated to the Regional Commissioner for the States within his Region; similarly the decision that a provision is "not approvable" is made by the Regional Commissioner, who usually begins negotiations with the State so it may amend or withdraw the questioned provision.

We would suggest, therefore, that you consult the Regional Commissioner for Region II, Mr. Elmer W. Smith, or the Associate Regional Commissioner for Assistance Payments, Miss Florence Aitchison, for information about why this particular section of the Regulations was considered not approvable two years ago and what its present status is. The address of the Region II office is Federal Building, 26 Federal Plaza, New York, N. Y. 10007. We are sending to Miss Aitchison a copy of the previous correspondence and of this letter so that she may be apprised of your questions.

Sincerely yours,

Catherine W. Miller
State Plan & Program Characteristics
Branch, AFA

APPELLEES' EXHIBIT "A"

NOV 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

-against-

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Appellees.

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants,

-against-

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

SUPPLEMENT TO MOTION TO AFFIRM

NASSAU COUNTY LAW SERVICES COMMITTEE, INC.
285 Fulton Avenue
Hempstead, New York 11550
Tel. (516) 292-8100

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel
56 Grand Street
White Plains, New York 10601
Tel. (914) 761-9200

Counsel for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

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Appellants,

-against-

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Appellees.

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, individually, and in his capacity as Commissioner of the Nassau County Department of Social Services,

Appellants,

-against-

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR; CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, and on behalf of all other persons similarly situated,

Appellees.

Appellees respectfully supplement the motion to affirm, dated November 6, 1974, in the above entitled appeals.

Appellants rely upon the dicta in Dullea v. Ott, 316 F.Supp. 1273 (D. Mass. 1970) and Boucher v. Minter, 349 F.Supp. 1240 (D. Mass. 1972), concerning the validity of a reclassification into "Group II" of the Massachusetts Public Assistance Policy

Manual. (Jurisdictional Statement, p.32). Appellees have shown that appellants' reliance upon the dicta in Dullea and Boucher is misplaced. (Motion to Affirm, pp. 10-11). In addition, appellants respectfully call the Court's attention to the fact that pursuant to a consent decree entered in the United States District Court for the District of Massachusetts on July 9, 1974, the Department of Public Welfare of the Commonwealth of Massachusetts has been permanently enjoined from enforcing this "Group II" classification by reducing the shelter allowance solely because of the presence of a non-recipient in the public assistance household. Bower v. Goldmark, D. Mass. No. 74-82-M, Final Decree entered July 9, 1974. A copy of this consent decree is annexed hereto. This consent decree clearly supercedes the dicta in Dullea and Boucher, and makes it clear that the "Group II" classification no longer exists in Massachusetts.

Dated: November 13, 1974
White Plains, New York

Respectfully submitted,

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Counsel for Appellees

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

EARL T. BOWER, CHARLOTTE BRUNNER, on behalf of themselves, their minor children and all others similarly situated,

Plaintiffs

vs.

PETER GOLDMARK, Secretary of the Executive Office of Human Services of the Commonwealth of Massachusetts, and STEVEN A. MINTER, Commissioner of the Massachusetts Department of Public Welfare, individually and in their official capacities, and THE DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF MASSACHUSETTS

Defendants

CIVIL ACTION
NO. 74-82-M

FINAL DECREE

The parties to the above-entitled action agree to the entry of the following decree:

1. The regulations of the Massachusetts Public Assistance Policy Manual (MPAPM) appearing at Chapter IV, 8A, Part 1, pages 12 and 13, which establish the Group II plan for AFDC families who reside with non-recipients of public assistance are inconsistent with the regulations implementing the Social Security Act, specifically 45 C.F.R. §2 3.90 (a), as they conclusively presume the availability of income from non-legally liable persons.

BEST COPY AVAILABLE

2. The defendant Peter Goldmark, as Secretary of the Executive Office of Human Services of the Commonwealth of Massachusetts, and the defendant Steven A. Minter, as Commissioner of the Massachusetts Department of Public Welfare, and their agents, employees, attorneys, and successors in office (hereinafter the Defendants), are permanently enjoined:

A) from enforcing or giving any effect to the aforesaid Group II plan, MPAPM Chapter IV, §A, Part 1, pages 12 and 13, for AFDC families who reside with non-recipients of public assistance;

B) from failing on or before July 1, 1974, to promulgate the following regulations which will:

1) add a new page 12 of Chapter IV, Section A, Part 1, which will (a) provide a new definition for Group I - Full Common Household Expenses, as follows:

"Group I - Full Common Household Expenses

This group includes any situation where: (1) The AFDC family or pregnant woman is responsible for the full cost of household expenses and does not reside with another family or individual. In this arrangement client is entitled to a full rental exception based on actual rent; or (2) The recipient is responsible for paying the full shelter costs, but lives with a non-recipient(s). All payments from the non-recipient(s) towards the recipient's household expenses are to be considered as income, unless the individual(s) residing in the home is a roomer or boarder, in which case income will be considered in accordance with Chapter IV, Section 13, page 2, item 5.

In this situation client is entitled to full rental exception based on actual rent; or (3) The AFDC family or pregnant woman shares the cost of household expenses with a non-recipient. A rental exception may be provided in this situation if the actual amount of rent paid by the recipient warrants such an exception."

and (b) will change the definition of Group II so that it will read in its entirety:

"Group II - Shared Common Household Expenses

This group includes any type of living arrangement where the AFDC family shares the cost of rent or carrying charges, fuel and utilities with (1) another AFDC family or (2) a GR family with children."; and

2) delete from page 13 of Chapter IV, §A, Part 1, the first sentence of the second paragraph under "OTHER LIVING ARRANGEMENTS", which reads:

"(In situations involving non-recipients, they are responsible for their proportionate share of common household expenses.)"

C) from failing on or before July 15, 1974, to distribute the following State Letter:

(heading)

State Letter_____
(date)

TO: WELFARE SERVICE OFFICES

FROM: STEVEN A. MINTER, COMMISSIONER

RE: PLACEMENT OF AFDC FAMILIES RESIDING WITH NON-RECIPIENTS IN GROUP I

BEST COPY AVAILABLE

This letter transmits material which changes the Department's policy in the budgeting of AFDC families who reside with non-recipients of public assistance, which is the result of a consent decree filed in Federal Court.

AFDC families who reside with non-recipients and share the cost of household expenses are to be budgeted in Group I. In this situation any payment made for shelter by the non-recipient is not to be considered as income to the recipient. Rental exceptions are to be based on the actual rent for which the AFDC family is responsible. In addition, AFDC families who are responsible for paying all the shelter costs but who have non-recipients living with them are to be budgeted in Group I. In the latter situation any payment towards the recipient's household expenses made by the non-recipient(s) is to be considered income to the recipient and deducted from the budget as income unless the non-recipient is a boarder and the income is to be considered in accordance with the policy in Chapter IV, Section B, Page 2, item 5.

Budgets are to be adjusted pursuant to this State Letter retroactive to July 1, 1974.

PEN AND INK REVISIONS

PA Policy Manual, Chapter IV, Section A, Part 1, page 13 - Delete the entire second paragraph under OTHER LIVING ARRANGEMENTS.

NEW AND REVISED MATERIAL

PA Policy Manual, Chapter IV

Section A, Part 1, Page 12 - transmitted by S.L. #74"; and

D) from failing to mail, on or before July 15, 1974,

a notice from Central Data Processing as follows:

"TO AFDC RECIPIENTS WHO LIVE WITH OTHERS

Our records indicate that you are in a living arrangement with another individual or family. If you are living with an individual or a family who are not receiving AFDC, General Relief or Supplemental Security Income, you

should answer the following questions and bring them to the WSO so that the amount of your assistance can be changed (in most cases it will result in an increase in your grant):

Answer these questions only if you live with someone who is not a recipient.

1. What is the total cost of shelter for your home?

   a. Rent
   b. Mortgage _____
   c. Heat _____
   d. Utilities _____

2. What is the actual cost that you pay towards these items?

   a. Rent
   b. Mortgage _____
   c. Heat _____
   d. Utilities _____

When you come to the Welfare Office, please bring any statements, bills, or receipts which reflect the above costs. All adjustments will be retroactive to July 1, 1974.

This change is a result of a consent decree entered in Federal District Court in Boston in the case of Bower v. Goldmark, 74-82-M. If you have any problems, contact Central Massachusetts Legal Services in Fitchburg, or the Harvard Legal Aid Bureau in Cambridge."; and

E) from failing to have adjusted all budgets of AFDC families who reside with non-recipient(s) according to the above regulations by September 1, 1974.

Steven A. Minter
STEVEN A. MINTER, Defendant
Commissioner of Public Welfare

[illegible]
Attorney for Defendants

BEST COPY AVAILABLE

Charles D. Burkam

Valerie Vanaman

Charles R. Capace

ATTORNEYS FOR PLAINTIFFS

By order of the Court.

FRANK J. MURRAY
District Judge for the
District of Massachusetts

Entered:
July 9, 1974